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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. [redacted] /62

SELINA ROMMEL, ET AL., *Petitioners*,

v.

ROBERT F. KENNEDY, Attorney General, and as Successor to the Alien Property Custodian.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioners, Laura Irene de Courten, Selina Rommel, Nikolaus Rommel, and Candida Rommel, appellees below, pray that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in the above-entitled cases.

OPINIONS BELOW

The findings of fact and conclusions of law of the District Court are unreported. They are set forth together with the judgment of that court at pages 55-64 of the certified transcript of the record herein (R. 55-64). The opinions of the Court of Appeals for the District of Columbia Circuit are not yet reported. They are set forth at pages 151-153 of the certified transcript of record herein (R. 151-153) and in Appendix A hereto (pp. A-1-A-3, *infra*). The judgment of the court is set forth at page 154 of the record and in Appendix B (pp. B-1-B-2, *infra*).

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit, reversing the District Court, was dated and entered March 15, 1962 (R. 154). Since the *per curiam* opinion decided the cases solely on the authority of *N. V. Handelsbureau La Mola* v. *Kennedy*, 299 F. 2d 923 (U.S.C.A.D.C.). Appendix C (pp. C-1-C-7 *infra*), decided February 1, 1962 (R. 151 at 153) no petition for rehearing was filed. The jurisdiction of this Court is invoked under Tit. 28 U.S.C., Secs. 1254(1) and 2101(e).

QUESTIONS PRESENTED

Whether individuals who were resident within the territory of a neutral nation (Switzerland) at the time of the vesting of their property under the Trading with the Enemy Act, as amended, are "enemy" within the meaning of Section 2(a) of such Act, so as to preclude them from maintaining suits under Section 9(a) of the Act, for the return of such property, solely because they had previously resided within the territory of a nation (Germany) with which the United States was at war.

Whether if the Trading with the Enemy Act, as amended, were interpreted to include such residents of a neutral country within the definition of "enemy" the Act would come into conflict with the Fifth Amendment to the Constitution of the United States, by taking private property for public use without just compensation.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved are the Fifth Amendment to the Constitution of the United States, and Sections 2(a) and 9(a) of the Trading with the Enemy Act, 40 Stat. 411 (1917), as amended, 50 U.S.C. App. §§ 2(a) and 9(a) (1958), which are set forth in Appendix E hereto (pp. E-1-E-2, *infra*).

STATEMENT

A summary of the findings of the District Court follows: In 1951 the Attorney General of the United States by a series of vesting orders vested property of petitioners which consisted principally of remainder interests after a life estate in being in a testamentary trust and in an *inter vivos* trust. The life estate in each was that of Rosamond Blanchard de Courten, an American citizen. The value of the property in the trusts is in the area of one and one-half-million dollars.*

The two large trusts were established, one by Rosamond Blanchard de Courten, born Rosamond Dove Blanchard, at the time of her marriage, the other by

* Other trust interests of the same persons were vested in the same year, in addition to trust interests vested in 1947. These interests are of relatively small value, but all are included in the suits.

the will of her mother, Laura Dove Blanchard Duncan. These trusts and the other trusts were all established by members of the Blanchard family, an old New England family. All the trusts were made by deed or will in Massachusetts, became effective there, and have been administered in the Commonwealth of Massachusetts subject to its laws. They were established at various dates from 1903 to 1931.

There are four petitioners, the plaintiffs below. The first is Laura Irene de Courten, born in 1907, the daughter of Rosamond Blanchard de Courten, an American citizen, and of Carlo de Courten (deceased) who had Swiss and German citizenship. The remaining three plaintiffs are Selina, Nikolaus and Candida Rommel, the grandchildren of Rosamond Blanchard de Courten. They were born in 1934, 1936 and 1940. Since 1944 they have been orphans. Laura Irene de Courten had Swiss and German citizenship at her birth. The Rommel children were German citizens by birth.

Prior to the war Laura Irene de Courten lived with her parents in Germany, and from 1939 on, the Rommel children and their parents lived with them at Miesbach, a small town in Germany not far from Munich. After 1944, the family living at Miesbach consisted of Rosamond Blanchard de Courten, Laura Irene de Courten, and the three Rommel children, ranging (in 1944) from ten to four years of age. After the death of their parents in that year, Laura Irene was appointed their guardian by the Court of Guardianship at Miesbach.

In November 1945 Laura Irene and her mother were able to get permission to travel from Miesbach to Berne, Switzerland, which they did, Laura Irene traveling on a Swiss passport. Mrs. de Courten remained at Berne

and Laura Irene got authority from Switzerland to bring the Rommel children, who were German citizens, into Switzerland. She then returned to Miesbach and got permission from the Guardianship Court there and the occupation authorities to take the children to Switzerland. Her application to the Court at Miesbach stated that she was moving to Switzerland and would take the children with her. With Swiss visas, and travel documents from the Allied Occupation Authorities in Germany, Laura Irene de Courten took the three small children to Switzerland with the intention of taking up permanent residence there.

The family lived first in Worb, a small town in Switzerland near Berne, and later moved to Gstaad, a small town about 80 miles from Berne where they still live. The children attended various schools in Switzerland from 1946 on.

Laura Irene de Courten, in September 1946, asked for her release from German citizenship, and in November 1948 she was released from it.

In January 1949 the German Court of Guardianship at Miesbach consented to the taking over of the guardianship of the Rommel children by the Guardianship Authority at Saanen, Switzerland, and in June, 1949, Laura Irene de Courten was appointed their guardian by that Authority. In the years 1956 and 1958 the three Rommel children became naturalized Swiss citizens. Nikolaus Rommel did military service in the Swiss Army in 1957 and 1958.

The jurisdiction of the United States District Court for the District of Columbia was based upon Section 9(a) of the Trading with the Enemy Act, as amended, *supra* (hereinafter sometimes referred to as "the Act").

After trial, the District Court found that the petitioners herein were resident in Switzerland at the several dates of vesting in 1947 and 1951, and held on the authority of *Willenbrock* v. *Rogers*, 255 F. 2d 236 (3 Cir., 1958) Appendix D hereto (pp. D-1-D-6, *infra*) that they were not enemies within the definition in Section 2(a) of the Act, and were entitled to the return of their property interests (R. 62). The Court of Appeals, *per curiam*, reversed the decisions on the authority of *N. V. Handelsbureau La Mola* v. *Kennedy*, *supra*, App. C-1-C-7, decided after argument and before the decision of the cases at bar.* The ground of the decision on appeal is the interpertation of the Act as defining "enemy" to include any person who had been a resident of enemy territory at any time during the war, regardless of his residence at the time of the vesting orders.

REASONS FOR GRANTING THE WRIT

Introduction

The decision of the court below is in direct conflict with the decision of the Third Circuit Court of Appeals in *Willenbrock* v. *Rogers*, 255 F. 2d 236, rehearing denied (1958). Further there is virtually a dissent by Chief Judge Miller to the decision below, who concurring only in the result, states:

> "While this case was under submission, my brothers here and a third judge handed down a decision in *N. V. Handelsbureau La Mola* v. *Kennedy* which had been heard shortly before the hearing of the present appeals. As I did not participate in that case, I had no opportunity to protest against the decision rendered. Although I do not agree with

* That case is hereinafter referred to as "*La Mola*". A petition for a writ of *certiorari* in that case was filed in this Court on April 26, 1962.

> it, the *Handelsbureau* opinion is a binding precedent which requires reversal here. For that reason only, I concur in the result of the majority opinion in these appeals." (R. 153, App. A-3.)

Since the decision in the cases at bar is made to rest on the *La Mola* case, it is necessary to refer to it. In the *La Mola* case the court held that property of a Netherlands corporation could be vested and confiscated on the ground that the Netherlands had been occupied by the military and naval forces of the enemy, even though the vesting took place on December 15, 1950, several years after the enemy occupation ceased. The court states that, "The purposes of the Act are not fulfilled if all vesting and seizure must be accomplished during hostilities or enemy occupation." *Supra*, p. 925, App. C-3.

This statement as to the purposes of the Act is discussed in this Petition at pp. 14-16, *infra*. The only unfulfilled purported purpose, it is submitted, is to confiscate the foreign-owned property, not for use in the prosecution of the war, but merely to reduce the cost of the war to the United States. In the cases at bar that property is the American inheritances—future interests which had not come into possession and enjoyment—of the descendants of an American family.

In arriving at its decision in *La Mola*, the court below stated:

> "... [T]he definition of enemy in Section 2 of the Act ... is to be construed as including *a person who* or a corporation which, *at the time of the vesting order, is one who has been resident of an enemy* occupied nation during its occupation or was then incorporated under the laws of an occupied territory and resident therein." *Supra*, p. 926, App. C-4. (Emphasis added.)

This construction is in conflict with the common law decisions, beginning with *The Venus* (U.S.), 8 Cranch 253 (1814), which hold that enemy status based solely on residence, is lost upon a change of residence to non-enemy territory. The court's construction is contrary to the intention of the Act to mitigate the common law, rather than to make a more severe rule, and the legislative history shows this.

The Court of Appeals itself states that its decision "rests solely on a *technical* enemy status acquired by appellant" under the Act. *Supra*, p. 927, App. C-6. (Emphasis supplied.) It is submitted that it is shown herein that the court erred in its determination that such a technical enemy status existed at the time of vesting. The ensuing harsh consequences on these individuals should not be permitted to stand.

The court below in the *La Mola* decision concludes that there is no constitutional question present and inferentially, so concludes in the cases at bar. Petitioners urge that there is the same constitutional problem in these cases which this Court found in *Guessefeldt* v. *McGrath*, 342 U.S. 308 (1952), namely whether there is a confiscation in conflict with the Fifth Amendment, which protects citizens and aliens who are not enemies from a taking of property without just compensation.

I

THE DECISION BELOW IS SQUARELY IN CONFLICT WITH THE DECISION OF THE THIRD CIRCUIT COURT OF APPEALS IN WILLENBROCK v. ROGERS, SUPRA, WHICH HELD THAT WHETHER ENEMY STATUS ATTACHES BY VIRTUE OF RESIDENCE IS TO BE DETERMINED BY THE ENEMY OR NON-ENEMY RESIDENCE AT THE TIME OF THE VESTING ORDER, AND THAT CONFLICT SHOULD BE RESOLVED BY THIS COURT

Prior to *La Mola, supra*, there was only one decision on the question whether residence in enemy territory prior to the date of vesting results in enemy status and the Third Circuit Court of Appeals in *Willenbrock* v. *Rogers, supra*, flatly decided that it does not. It explicitly ruled that enemy status attaching solely by residence in enemy territory is lost by permanent removal from the territory with respect to property not then vested. The substance of the Court's holding in that case is shown by the following pertinent quotation from Judge Goodrich's opinion:

> "It was mentioned that there are two vesting orders. One was in 1947 * * *, and the other was in 1950 * * *.
>
> "* * * The complaint in this case says that the plaintiff returned to the United States October 16, 1949 and took up her residence in the Eastern District of Pennsylvania. * * *
>
> "Assuming that it can be shown that the plaintiff was a resident of Pennsylvania beginning October 16, 1949, the provision of the statute discussed above [i.e., § 2(a) of the Trading with the Enemy Act] does not apply to her. The vesting order applies to the situation existing at its date. Swiss Nat. Ins. Co. v. Miller, 1925, 267 U.S. 42,

45 S. Ct. 213, 69 L. Ed. 504; Rudenberg v. Clark, D.C.D. Mass. 1947, 72 F. Supp. 381, 383. * * *"

> "It appears, therefore, that the judgment of the court below must be reversed as to the property included in the first seizure of 1947 but *as to that which was taken under the 1950 vesting order, it would appear that the plaintiff is entitled to recover if in fact she no longer was a resident of Germany when the 1950 order became effective.*" *Supra*, pp. 238-239, App. D-4-D-6. (Emphasis supplied.)

Willenbrock is right and the decision below is wrong, because *Willenbrock* is in accord with the common law and the construction given in that opinion to the definition of enemy, when a status resulting only from residence, is supported by the legislative history of the Act, as is explained in Point II, *infra*, p. 17.

Since in both *Willenbrock* and *La Mola* the case of *Swiss Nat. Ins. Co. v. Miller*, 267 U.S. 42 (1925) is cited, but in support of conflicting results, it is necessary to examine the citations and the opinion in the *Swiss Insurance Co.* case. In the *Willenbrock* opinion Judge Goodrich states:

> "The vesting order applies to the situation existing at its date. Swiss Nat. Ins. Co. v. Miller * * *." *Supra*, p. 238, App. D-5.

In the *La Mola* opinion the court quotes from the same case as follows:

> "'The word "enemy" * * * of course refers to the person who or corporation which fulfilled the definition of an enemy during the war.' Swiss Nat. Ins. Co. v. Miller, 267 U.S. 42, 45." *Supra*, p. 926, App. C-4.

In the opinion of this Court in *Swiss Insurance Co.*, Taft, C.J., states:

> "The plaintiff's petition admitted that *at the time of the seizure* the plaintiff was doing business in Germany, and was *then an enemy of the United States* under the definition [in Section 2 of the Act], and that the seizure was lawful." 267 U.S. 42, 44 (Emphasis supplied.)

The opinion states further:

> "The first contention, that because the company had ceased to do business in Germany after the seizure the Alien Property Custodian lost his right to continue to hold the property, can not be sustained. A change like this could not take away the status of the seized property as enemy property. The withdrawal from business in Germany might well involve a transfer of something of value from the plaintiff to enemy citizens or subjects and strengthen the enemy resources.
>
> "Second, it is argued that as the War ended by Joint Resolution of July 2, 1921 * * *, the plaintiff thereby ceased to be an enemy and was entitled to a return of its property without express legislation giving such a right. It is clear from Section 12 of the Trading with the Enemy Act * * *, that Congress did not intend that such a right should exist. One clause of that section provides:
>
> "'After the end of the War any claim of any enemy or of an ally of enemy to any money or other property received and held by the Alien Property Custodian or deposited in the United States Treasury, shall be settled as Congress shall direct.'
>
> "The argument for the appellant is that when the War ended, it ceased to be an enemy and so the words quoted do not apply to it. This is an

> impossible construction of the section. After the end of the War, there could be no enemy in the sense in which the appellant argues. The word 'enemy' used in Section 12 of course refers to the person who or corporation which fulfilled the definition of an enemy during the war. * * * " *Supra*, pp. 44-45.

The above quotation from the opinion of this Court makes it apparent that the decision supports the position in *Willenbrock*, that the date of vesting is the critical date. The quotation from the *Swiss Insurance* opinion in the *La Mola* case is of a sentence directed to the issue of whether a person who was an enemy at the time of seizure ceased to be an enemy in relation to the property seized by virtue of the legal termination of the war. There is no such issue in the cases at bar, nor in the *La Mola* case. The quotation made in the *La Mola* case is taken out of context. This Court should approve the application of *Swiss Insurance* made by the Court in the *Willenbrock* case, as set out in the opinion of Judge Goodrich, and should disapprove the interpretation of it in the *La Mola* case.

The court below also relied upon *Hansen* v. *Brownell*, 18 U.S. App. D.C. 230, 234 F. 2d 606 (1956); and *Bank Voor Handel en Scheepvaart, N. V.* v. *Kennedy*, 288 F. 2d 375 (1961), cert. den. 366 U.S. 962, as "lending some support to the position we take . . .". *Supra*, p. 926, App. C-5. *Hansen* held that a person who had cast his lot with the enemy and acted as an enemy agent could not recover his property although he had ceased so to act at the time of vesting. The court was careful there to reserve the question whether former residence in enemy territory could have that continuing effect. We submit that *Hansen* is right because by his own

free will Hansen had committed hostile acts in broadcasting enemy propaganda. By espousing the enemy's cause and actively aiding it, he had made an irrevocable choice. It is only just and proper that he should be accepted on his own terms, but that reasoning does not apply to one who is an enemy solely on the basis of residence when he has committed *no* hostile act. He is an enemy only because of his location in enemy territory and when that location ceases his enemy status should cease. This Court in commenting on *The Venus*, *supra*, in *Guessefeldt* v. *McGrath*, *supra*, noted a distinction between enemy status which follows location and enemy status arising from hostile acts and suggests the enduring quality of the latter. *Supra*, p. 318. See also, *Miller* v. *United States*, (U.S.) 11 Wall. 268, 310, 311 (1870). *Hansen*, then, is no authority for the court's decision in *La Mola*.

Bank Voor Handel clearly has no relevance because there the property was seized during the enemy occupation and petitioners do not dispute that property which was enemy owned at the time of its seizure cannot be recovered in a 9(a) action. The question, however, is whether one who has had enemy status solely on the basis of residence remains an enemy after he has changed his residence to non-enemy territory prior to the vesting of his property.

In *La Mola* the court below cites also *Orme* v. *Northern Trust Co.*, 410 Ill. 354, 102 N.E. 2d 335 (1951), cert. den., *Hardenberg* v. *McGrath*, 343 U.S. 921, to the effect that "technical enemy status" is not terminated with the end of hostilities. *Supra*, p. 926, App. C-4. Petitioners do not dispute that point. Since the *Orme* case deals with "resident German nationals" at the time their property was vested in 1949 (102 N.E. 2d,

at 335), it has no bearing on the cases at bar in which all the petitioners were non-residents of Germany on all the vesting dates and one of them—Laura Irene de Courten—was not a German national on the principal vesting dates.

In *La Mola* the court states that, "The purposes of the Act are not fulfilled if all vesting and seizure must be accomplished during hostilities or enemy occupation," *supra*, p. 925, App. C-3, and goes on to observe that if the enemy controlled property is not discovered during the period of enemy occupation its usefulness to the enemy is not obviated. To the extent that this is true, it is so only during the period of enemy occupation, in the *La Mola* case, and during the period of residence in enemy territory in the cases at bar. See *Miller* v. *United States*, *supra*, p. 306. Any possible enemy control having been terminated either by the expulsion of the enemy from the occupied territory, or by the removal and change of residence by the former residents in enemy territory, it is submitted that no possibility continues to exist for enemy use of the property. This is all the more emphatic when a vesting is effected after hostilities have ceased. The only function of vesting thereafter is clearly shown by the statement of the court that if recovery is permitted it would "deprive the United States of valuable means of supporting its own war efforts". *Supra*, p. 926, App. C-4. The court then states, "Those efforts, and the heavy responsibilities consequent upon a war, persist long after hostilities have ceased and occupied countries have been freed of the enemy." *Supra*, p. 926, App. C-4. It is difficult to see how the "war efforts" were continuing in the years of 1950 and 1951, years of vest-

ing with which the court was concerned in the several cases at bar and in *La Mola*.

It is submitted that the real decision as applied to the cases at bar is that the American inheritances (future interests which had not come into possession and enjoyment) of certain descendants of an American family are confiscated, not for use in prosecution of the war, but merely to reduce the cost of the war to the United States. While no objection can be raised to requiring an enemy nation to contribute to the cost of the war, this contribution must be as a nation and not as a levy on particular individuals. The justification for taking property of enemy individuals after hostilities have ceased, as is suggested in *Propper* v. *Clark*, 337 U.S. 472, 484 (1949), rests on the assumption that the individual whose property is taken may look to the enemy nation for reimbursement.* No such possibility exists for persons who years before the vesting relinquished their residence in enemy territory and have established a new life in another country, and as in the cases at bar, have relinquished enemy citizenship. To take the American inheritance of individuals whose only connection with the enemy is a past residence in

* It should be noted for example that in the Treaty of Versailles, it was expressly provided that the enemy nation (Germany) undertook to compensate her nationals in respect of the sale or retention of their property, rights or interests in the United States [and other allied or associated states]. (Article 297(d), (i) of the Treaty of Versailles) Treaties, Conventions, International Acts, Protocols and Agreements between the United States and Other Powers—1910-1923 Vol. III, pp. 3331, 3462, 3464. Article V of the Bonn Convention between the Federal Republic of West Germany and the United States, 1952, TIAS 3425, provided that the Federal Republic of Germany would compensate its own nationals for property which the United States and its allies had confiscated as "enemy".

an enemy country is a consequence barbarous and uncivilized.

Persons who committed no hostile act against the United States, who by their own free choice and with the permission of the Allied Occupation Authorities abandoned Germany to make their lives elsewhere, should not, after effectuating that decision be treated in the same manner either as persons who have committed a hostile act against the United States, or persons who by their own free will and choice desire to remain and bear the fate of the conquered enemy nation. Petitioners did everything within their power to sever their ties with an enemy nation. They should not have those ties thrust back upon them by a strained construction of a statute which can serve no wartime purpose or function and can only serve to prevent petitioners' receiving remainder interests of substantial value in American trusts created for them by their American relatives.

The reason given by the court in an attempt to justify confiscation that "Property subject thereto [vesting] during enemy occupation is available to the control of the enemy in aid of its warfare against the United States and its allies." *Supra*, p. 925, App. C-3 has no validity now and had none during World War II. Enemy property within the United States could not be used against this country or its allies because of the Treasury's wartime freezing controls.*

The conflict between the decision of the Court of Appeals for the District of Columbia Circuit and the Court of Appeals for the Third Circuit should be resolved by this Court. The Trading with the Enemy

* Executive Order No. 8389, as amended, 6 F.R. 2897.

Act is permanent legislation "effective at the time of any future war unless repealed or superseded". *Markham* v. *Cabell*, 326 U.S. 404, 409 (1945). Enemy property was treated under it in World War I, and all alien property was dealt with under it in World War II. With regret it must be said that it may come into use again at a time soon or remote. It is only fair to all our alien friends throughout the free world who have entrusted their property to our financial institutions, or otherwise have property here, to tell them what the rules applicable to their property interests will be, and under what circumstances they may find their property confiscated even without their support of an enemy cause.

II

THE DECISION OF THE COURT BELOW IN ENLARGING THE DEFINITION OF "ENEMY" IN THE ACT BEYOND ITS SCOPE AT COMMON LAW, THE LITERAL CONSTRUCTION OF THE DEFINITION, AND THE APPARENT CONGRESSIONAL INTENT, HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT

A. At Common Law Residence in Enemy Territory Prior to the Time of Seizure of the Property Was Irrelevant

At common law the validity of wartime confiscation of the property of non-combatants (in the absence of hostile acts) was adjudicated in the prize seizure cases, and they are unanimous in holding that the enemy or *non-enemy character* of the owner of captured property depends on whether *at the time of capture* he resided within enemy territory. *The Friendschaft* (U.S.), 3 Wheat 12 (1818); *The Venus* (U.S.), 8 Cranch 253 (1814); *United States* v. *Guillem* (U.S.), 11 How. 47 (1850); *The Francis*, 1 Gall. 614, Fed. Cas. No. 5034

(1813), aff'd (U.S.) 8 Cranch 363; *Duguet* v. *Rhinelander*, 2 Johns. Cas. (N.Y.) 476 (1802).

The leading case, of course, is the celebrated English case *The Indian Chief*, 3 C. Rob. 12 (Eng. 1801), which holds that enemy character gained by residence in enemy territory ceases by change of residence to non-enemy territory with respect to property not then seized. That principle of law first laid down in the English courts was adopted by this Court in *The Venus*, *supra*, where it was held that an American citizen resident within an enemy country at the time of the seizure of his property was properly treated as an enemy because of the enemy character he derived from his residence. But Mr. Justice Washington expressly adopted the principle laid down in *The Indian Chief*, *supra*, and said:

> "... this national character which a man acquires by residence, may be thrown off at pleasure, by a return to his native country ... To use the language of Sir W. Scott, it is an adventitious character gained by residence, and which ceases by non-residence ... Having once acquired a national character by residence in a foreign country, he ought to be bound by all the consequences of it, until he has thrown it off ... by an actual return to his native country ..." *Supra*, pp. 280, 281.

In the Mexican War in the case of *United States* v. *Guillem*, *supra*, the property of a French citizen not engaged in trade who resided in Mexico during part of the war, was seized after his departure from Mexico for France in the midst of the war. His property was returned, Mr. Chief Justice Taney saying for this Court:

> "The hostile character which his domicile in Mexico had impressed upon him and his property

> had . . . been thrown off; and as soon as he sailed from Vera Cruz he resumed the character of a French citizen, and as such was entitled to the rights and privileges of a neutral, in regard to his property, as well as in his person." *Supra*, p. 60.

And, in the case of a citizen of an enemy nation who was resident in a neutral country at the time of the seizure of the property, it was held that he was entitled to a return notwithstanding a sojourn in the territory of an enemy country at the time of instituting suit. *The Friendschaft, supra.*

So, too, in *Duquet v. Rhinelander, supra*, where a Frenchman in the midst of a war between France and England, emigrated to the United States from France, it was held by New York's highest court that his property seized by the English after he had established his residence in the United States was neutral property.

It is clear beyond peradventure of doubt that at common law enemy status acquired solely on the basis of residence is lost by a change of residence. The decision in *Willenbrock* accords with the common law. The decision of the court below in the instant case in holding that once an enemy by virtue of residence, always an enemy, is directly contrary to the principle of the common law.

B. A Reading of the Act and Its Legislative History Shows No Congressional Intention to Change the Common Law Rule

The court below in upholding the confiscation in *La Mola*, without even mentioning the legislative history of the Act, stated:

> ". . . we think that in the absence of clearer language indicating the necessity for a different construction the enemy status appellant acquired

during the occupation continued, insofar as section 9(a) is concerned, to the time of the vesting order; that is, we think that at that time the end of hostilities and of the occupation of the Netherlands had not removed appellant from the technical enemy status it had acquired during the occupation." *Supra*, p. 926, App. C-4.

The court below, in summarily deciding the instant case on the basis of *La Mola*, held that once an enemy by virtue of residence, always an enemy, even though the residence is changed to non-enemy territory. That holding is contrary to a fair reading of the Act and is contrary to the intention of Congress as shown by the Act's legislative history.

Section 2 of the Act in pertinent part provides:

"The word 'enemy,' as used herein, shall be deemed to mean for the purposes of such trading and of this Act—

"(a) any individual, . . . resident within the territory . . . of any nation with which the United States is at war, . . ."

It must be observed that the Act does not define the term "enemy" as "any individual *who at any time* [during the war] *has been resident* within the territory of any nation with which the United States is at war", but that is the definition of enemy by virtue of residence enunciated by the court below. If that is what Congress intended it could well have said it. But Congress did not use that language in Section 2. Thus a plain reading of the Act casts considerable doubt upon the construction of the Act given by the court below in *La Mola* and adopted in its decision of the cases at bar.

The legislative history of the Act makes it abundantly clear that the definition of enemy was intended

to be within the common law rule. The House report on the bill which became the Trading with the Enemy Act (H. Rep. 85, 65th Cong. 1st Sess., June 21 (1917), stated:

> "The purpose of the bill is not to create new international rules or practices but to define and mitigate them."
>
> "The first modification is found in the definition of the word enemy."

Since, then, no new rules were created, Congress intended to enact into the statute the international and common law rule that enemy status acquired on the basis of residence in enemy territory is lost by a change of residence to non-enemy territory prior to seizure.

Subsequent amendment to the Act leaves no room for doubt that both the Executive and the Congress understood the definition of enemy to mean enemy at the time of seizure. In the hearings which the House held on an amendment to the Act (H. Comm. Hearings, 1920, Vol. 232-1, Point 8) the following exchange occurred between the Chairman of the Committee and the Assistant to the Solicitor of the State Department:

> "The Chairman: Does the seizure and retention of this property by the Alien Property Custodian, of citizens of Czechoslovakia, Yugo-Slavia, Bulgaria, Turkey and Alsace-Lorraine, involve any embarrassment on the part of the State Department?
>
> "Mr. Hill [Assistant to the Solicitor of the Department of State]: It does; yes, sir. In addition to that, they have taken the property of the citizens of Switzerland, Holland and other neutral countries, *who at the time, by reason of residence in Germany or otherwise, were included in the term*

> *'enemy'* . . . The custodian cannot release it, and the Attorney General cannot upon application, act favorably, because it was, technically, *enemy property at the time* . . . This government has recognized the existence of that country [Czechoslovakia] through the Executive, and yet we continue to hold property of its citizens which we cannot release at this time without an amendment of the Act *because they were enemies at the time the property was taken over.*" Quoted in *Swiss Nat. Ins. Co.* v. *Miller, Supra,* p. 66.

The court below in *La Mola* in deciding that once an enemy always an enemy, does refer, however, to the Joint Resolution of Congress of October 19, 1951,* which provided that:

> "* * * any property or interest which prior to January 1, 1947, was subject to vesting or seizure under the provisions of the Trading with the Enemy Act of October 6, 1917 * * * as amended, or which has heretofore been vested or seized under that Act * * * shall continue to be subject to the provision of that Act * * *."

The court said:

> "This included appellant's property, for during the occupation which preceded January 1, 1947, that property had clearly been subject to vesting and seizure." *Supra,* p. 925, App. C-3.

The court in upholding the confiscation overlooked that part of the Joint Resolution which states:

> "* * * Nothing herein * * * shall alter the status, as it existed immediately prior hereto, under that Act of Germany or of any person with respect to any such property or interest."*

*65 Stat. 451 (1951), 50 U.S.C. Appendix note preceding § 1 p. XX (1958).

This Resolution has no bearing on the cases at bar. It expressly provides that it does not alter the status as it existed immediately prior to the Resolution of any person with respect to any property interest. Their status, petitioners assert, on the grounds stated herein, was the same immediately prior to the Resolution as on the date of vesting, namely, that of persons not "enemy" and therefore entitled to the return of their property. Clearly, the Joint Resolution was intended only to continue the vesting power so that the vesting program could be brought to an orderly close even though the war was declared formally terminated. It did nothing to change the definition of enemy.

III

THE DECISION IN THE COURT BELOW BY ENLARGING THE DEFINITION OF "ENEMY" IN THE ACT HAS RAISED A CONSTITUTIONAL QUESTION—WHETHER IN THE EXERCISE OF THE WAR POWER PROPERTY CAN BE CONFISCATED WITHOUT ANY COMPENSATION ON THE SOLE GROUND THAT THE OWNER HAD FORMERLY RESIDED IN ENEMY TERRITORY—WHICH QUESTION THIS COURT SHOULD SETTLE

The Fifth Amendment requires just compensation upon the taking of property, even if for the prosecution of a war, and even if the property belongs to an alien, if not an "enemy". *Russian Volunteer Fleet* v. *United States*, 282 U.S. 481 (1931); *Silesian American Corp.* v. *Clark*, 332 U.S. 469, 479-484 (1947). Of course compensation is not required when property of an "enemy" is taken. *United States* v. *Chemical Foundation*, 272 U.S. 1, 11 (1926).

The problem of whether "any national of an enemy country [is] within the reach of constitutional protection" is posed in the opinion in *Guessefeldt* v. *McGrath*,

342 U.S. 308, 318 (1952). There this Court held that a German citizen physically present but not resident in Germany during World War II might maintain an action under Section 9(a) of the Act. This decision was reached because of the presence of a constitutional problem "not imaginary", and the desirability of a construction of the Act which by a fair reading avoids confiscation. *Supra*, p. 319. These were two of the considerations which brought about a construction of the Act which limited the scope of the language of Section 39 of the Act, which section, if it had stood alone, would clearly have forbidden any recovery.*

The court below in *La Mola* dismisses the *Guessefeldt* decision by stating that this Court found, "that the claimant [Guessefeldt] never came within the definition of an enemy". *Supra*, p. 927, App. C-6. It is submitted that the court below has unduly restricted the scope of the opinion in the *Guessefeldt* case.

In discussing the question of whether any national of an enemy country has constitutional protection, Mr. Justice Frankfurter refers among other decisions to *The Venus* (U.S.), 8 Cranch 253 (1814), which

> "* * * seems to say that at common and international law, in the absence of hostile acts, enemy status, at least for the purpose of trade, follows location and not nationality." *Supra*, p. 318.

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* The first sentence of Section 39 reads as follows:

"No property or interest therein of Germany, Japan, or any national of either such country vested in or transferred to any officer or agency of the Government at any time after December 17, 1941, pursuant to the provisions of this Act, shall be returned to former owners thereof or their successors in interest, and the United States shall not pay compensation for any such property or interest therein." *Guessefeldt* v. *McGrath*, *Supra*, p. 310.

The Venus is one of a considerable group of cases on enemy status, of which a number are discussed herein at pp. 17-19, *supra*. It is perfectly clear from them specifically *The Friendschaft* (U.S.), 3 Wheat. 14 (1818); *United States* v. *Guillem* (U.S.), 11 How. 47 (1850); and *Duguet* v. *Rhinelander*, 2 Johns. Cas. (N.Y.) 476 (1802) that at common law the change of domicile to a neutral country, for a legitimate and not a fraudulent purpose is effective. In the last cited case, a decision by the Court of Errors, then the court of last resort in the State of New York, it appeared that a French citizen during war between France and England had emigrated to the United States and had become domiciled here. He took out insurance on certain property belonging to him which was captured on the high seas by a British vessel. The court held that his warranty of neutral property was not broken, and permitted him to recover on the insurance for a total loss. The *Guillem* case makes it clear that the rule is not limited to the purposes of trade.

From those cases the conclusion follows that at common law a change of residence may make a person not an enemy, though he was an enemy before. It is submitted that it is a real question, recognized in *Guessefeldt*, whether a person who is not an enemy at common law may be declared to be an enemy, so far as it concerns the constitutional right not to have his property taken without just compensation.

The constitutional right here asserted only prevents confiscation. It does not interfere in any way with the exercise of the war or other powers of Congress in the prosecution of any war. All alien property may be blocked or vested, either for the use of the United States or to prevent its use by an enemy power. "The

problems of compensation may await the judicial process." *Silesian American Corporation* v. *Clark*, 332 U.S. 469 476 (1947).

It must be borne in mind that one of the petitioners, Laura Irene de Courten, at the principal times of vesting was not a German national or citizen, but was a resident and citizen of Switzerland and so a friendly alien. The other petitioners, who were minors, were then under Swiss and not German guardianship, and were Swiss residents. They subsequently became Swiss citizens. (R. 58, 59.) Accordingly, this Court should declare that since at common law petitioners herein when they had taken up their residence in Switzerland were friendly and not enemy aliens, they are protected by the Fifth Amendment and Section 9(a) of the Act from the confiscation of their property. Since the apparent remedy of the petitioners as to bring an action under Section 9(a), and since as is shown herein, and as *Willenbrock, supra*, holds, the Act is clearly open to that construction, this Court should not construe the Act to deny petitioners a remedy and leave them to enforce a constitutional right in the Court of Claims. This Court avoided such a result in *Clark* v. *Uebersee Finanz-Korp.*, 332 U.S. 480, 487, 488 (1947). Unquestionably the Government would claim suit in the Court of Claims was barred by the statute of limitations. See, Brief for Respondent in Opposition to petition for certiorari in the *La Mola* case, at page 14.

IV

CERTIORARI MUST BE GRANTED IN THE CASES AT BAR UPON THE GRANTING OF CERTIORARI IN THE LA MOLA CASE TO PREVENT INJUSTICE

The opinion *per curiam* in the Court of Appeals in the cases at bar was bottomed exclusively on the *La Mola* decision and opinion. At the argument of the cases at bar the decision and the opinion in that case had not been handed down. It was therefore impossible for petitioners to analyze the opinion and argue thereon to the Court. Since, as is stated by Chief Judge Miller, that opinion is a binding precedent which prevented his dissent, it was not open to petitioners to ask for re-argument in the Court of Appeals in order to establish whether or not a majority of the full bench of the court was of a contrary opinion.

The fate of petitioners having been determined by the *La Mola* case in the court below, relief granted in that case must be extended to the petitioners herein to prevent a procedural injustice, which would result if the decision in the cases at bar became final and thereafter the decision in the *La Mola* case was reversed.

CONCLUSION

Both the Court below and the Court of Appeals for the Third Circuit have construed the Trading with the Enemy Act, permanent Federal legislation, and have arrived at directly opposite conclusions. The Third Circuit has construed the Act in accordance with the common law and the Congressional intention as shown by the legislative history. The Court below has departed from the common law and has given no indication that it considered the legislative history. In so

doing, it has decided a constitutional question which this Court has said is debatable and should be avoided. Moreover, the court below in construing the Act has flouted the admonition of this Court that:

> "Considering that confiscation is not easily to be assumed, a construction that avoids it and is not barred by a fair reading of the legislation is invited." *Guessefeldt* v. *McGrath*, *supra*, p. 319.

The decision of the court below expands the statutory definition of "enemy" to confiscate future interests which had not come into possession and enjoyment belonging to friendly aliens, who at one time resided in enemy territory. It lays down rules which will govern the confiscation of property entrusted to United States business and financial institutions by aliens sympathetic to this country and the free world. It should not be permitted to stand.

The fortunes of the four petitioners have hung in the balance for more than a decade since the vesting orders. These descendants living abroad of an American family should receive from this Court the relief to which they are entitled by law, blocked only by the *La Mola* decision.

It is of the utmost importance that individuals should be protected in their property as well as their lives, and the statute, the common law, and the Constitution should be definitively construed by this Court to that end.

Wherefore petitioners pray that a writ of *certiorari* may issue.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 16447 and 16450

ROBERT F. KENNEDY, Attorney General
of the United States, *Appellant*

v.

SELINA FOMMEL, ET AL., *Appellees*

Nos. 16448 and 16449

ROBERT F. KENNEDY, Attorney General
of the United States, *Appellant*

v.

LAURA IRENE DE COURTEN, A/K/A
LAURA IRENE VON COURTEN, *Appellee*

Appeals from the United States District Court
for the District of Columbia

Decided March 15, 1962

Mrs. Pauline B. Heller, Attorney, Department of Justice, with whom *Assistant Attorney General William H. Orrick, Jr.*, *Messrs. Morton Hollander* and *Arthur R. Schor*, Attorneys, Department of Justice, were on the brief, for appellant.

Mr. James H. Mann, with whom *Mr. John W. Pehle* was on the brief, for appellees. *Mr. Richard Bancroft*, of the

bar of the Supreme Judicial Court of Massachusetts who was on the brief for appellees, was introduced to the court *pro hac vice*, but did not argue.

Before WILBUR K. MILLER, *Chief Judge*, and PRETTYMAN and FAHY, *Circuit Judges*.

PER CURIAM: Under section 9(a) of the Trading with the Enemy Act[1] appellees sued the Attorney General, appellant herein, to recover property vested under the Act by appellant's predecessor as Alien Property Custodian. The vesting orders were five in number. The first was issued in 1947 and the others in 1951.

A suit may be maintained under section 9(a) only by one who is not an "enemy" as that term is defined in section 2(a) of the Act.[2]

During World War II, and until January 1946, appellees concededly were citizens and residents of Germany. They thus acquired enemy status under the Act. They left Germany in January 1946, and entered Switzerland. By reason of evidence of (1) their intent to make Switzerland their permanent home, (2) the renunciation of German citizenship by appellee De Courten and her declaration of intention to maintain Swiss nationality, and (3) the naturalization of the other appellees as Swiss citizens, together with the fact that they were all residing in Switzerland prior to any of the vesting orders, they contend that their previous enemy status was removed before the vesting of their properties and that when the present actions were filed they were no longer enemies within the meaning of the Act.

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[1] 40 Stat. 411 (1917), as amended, 50 U.S.C. App. §§ 1-40 (1958).

[2] Under this provision, an "enemy" is defined in part as "any individual . . . resident within the territory . . . of any nation with which the United States is at war . . . ." 40 Stat. 411 (1917), as amended, 50 U.S.C. App. § 2(a) (1958).

On the authority of *N. V. Handelsbureau La Mola v. Kennedy*, —— U.S. App. D.C. ——, —— F.2d ——, decided during the pendency of these appeals, we hold that the enemy status of appellees for purposes of the Act continued to the time of the vesting orders, thus preventing appellees from maintaining their suits under section 9(a) of the Act.

The judgment in favor of appellees is accordingly reversed, and the cases remanded for dismissal of the complaints for lack of jurisdiction.

It is so ordered.

WILBUR K. MILLER, *Chief Judge*, concurring in the result only: While this case was under submission, my brothers here and a third judge handed down a decision in *N. V. Handelsbureau La Mola* v. *Kennedy*[1] which had been heard shortly before the hearing of the present appeals. As I did not participate in that case, I had no opportunity to protest against the decision rendered. Although I do not agree with it, the *Handelsbureau* opinion is a binding precedent which requires reversal here. For that reason only, I concur in the result of the majority opinion in these appeals.

[1] No. 16,471, decided February 1, 1962.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1961. Civil 1237-57

No. 16,447

ROBERT F. KENNEDY, Attorney General
of the United States, *Appellant*,

v.

SELINA ROMMEL, ET AL., *Appellees*.

September Term, 1961. Civil 314-58

No. 16,450

ROBERT F. KENNEDY, Attorney General
of the United States, *Appellant*,

v.

SELINA ROMMEL, ET AL., *Appellees*.

September Term, 1961. Civil 1238-57

No. 16,448

ROBERT F. KENNEDY, Attorney General
of the United States, *Appellant*,

v.

LAURA IRENE DE COURTEN, A/K/A
LAURA IRENE VON COURTEN, *Appellee*.

B-2

September Term, 1961. Civil 313-58

No. 16,449

ROBERT F. KENNEDY, Attorney General of the United States, *Appellant*,

v.

LAURA IRENE DE COURTEN, A/K/A LAURA IRENE VON COURTEN, *Appellee*.

Appeals from the United States District Court for the District of Columbia

Before: WILBUR K. MILLER, *Chief Judge*, and PRETTYMAN and FAHY, *Circuit Judges*.

Judgment

These cases came on to be heard on the record on appeals from the United States District Court for the District of Columbia, and were argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this court that the judgment of the District Court appealed from in these cases is reversed, and that these cases are remanded to the District Court with directions to dismiss the complaints for lack of jurisdiction.

PER CURIAM.

Dated: Mar. 15, 1962

Separate opinion by Chief Judge Wilbur K. Miller concurring in the result only.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16417

N. V. HANDELSBUREAU LA MOLA, *Appellant*,

v.

ROBERT F. KENNEDY, Attorney General of the United States, as successor to the Alien Property Custodian, *Appellee*.

Appeal from the United States District Court for the District of Columbia

Decided February 1, 1962

Mr. Dinsmore Adams, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of court, with whom *Mr. Lawrence S. Lesser* was on the brief, for appellant.

Miss Joan T. Berry, Attorney, Department of Justice, with whom *Assistant Attorney General William H. Orrick, Jr.*, *David C. Acheson*, United States Attorney, and *John G. Laughlin, Jr.*, Attorney, Department of Justice, were on the brief, for appellee. *Messrs. Arthur R. Schor* and *Walter T. Nolte*, Attorneys, Department of Justice, also entered appearances for appellee.

Before: EDGERTON, PRETTYMAN and FAHY, *Circuit Judges*.

FAHY, *Circuit Judge*: Appellant filed suit in the District Court, relying for jurisdiction upon section 9(a) of the Trading with the Enemy Act,[1] to recover property vested

[1] 40 Stat. 411 (1917), as amended, 50 U.S.C. App. §§ 1-40 (1958).

under the Act by appellee's precedessor as Alien Property Custodian.[2] The property consists of assets of appellant which were on deposit in banks in the United States. By the order now on appeal District Judge Walsh granted appellee's motion for summary judgment. We agree that the suit may not be maintained.

One cannot maintain a suit under section 9(a) to recover vested property unless the claimant is "not an enemy or ally of enemy," to quote the language of the section. "Enemy" is defined in section 2 of the Act as follows:

> (a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory.[3]

This definition includes a corporation incorporated within any territory which is occupied by a nation with which the United States, at the time of the occupation, "is at war." Concededly the Netherlands was occupied by military forces of the enemy of the United States during World War II, and concededly also throughout the occupation period appellant was a corporation organized and existing by virtue of the laws of the Netherlands. Appellant accordingly acquired enemy status. It correctly points out, however, that the vesting order was not made until December 15, 1950. It contends that enemy status which bars recovery of prop-

[2] The powers and functions of the Alien Property Custodian were transferred on October 15, 1946, to the Attorney General. Executive Order 9788, 3 C.F.R. 575 (1943-1948).

[3] 40 Stat. 411 (1917), as amended, 50 U.S.C. App. § 2(a) (1958).

erty under section 9(a) must be determined as of the time of the vesting order, and that on December 15, 1950, the occupation had ended and hostilities had ceased, with the effect of ridding appellant of its previous enemy status.

We are not in agreement with the above contention. The war had not ended when appellant's property was vested, or until the Joint Resolution of Congress of October 19, 1951.[4] In this Resolution Congress provided that property which had been subject to vesting and seizure prior to January 1, 1947, would continue to be subject to the provisions of the Act. This included appellant's property, for during the occupation which preceded January 1, 1947, that property had clearly been subject to vesting and seizure. And it had not lost its status by the ending of hostilities prior to January 1, 1947. *Cf. Fegerabend* v. *McGrath*, 89 U.S. App. D.C. 33, 35, 189 F.2d 694, 696.

The purposes of the Act are not fulfilled if all vesting and seizure must be accomplished during hostilities or enemy occupation. Property subject thereto during an occupation is available to control of the enemy in aid of its warfare against the United States and its allies. However, actual vesting might not then be possible. For example, the Custodian might not discover the property during the period of enemy occupation or, if discovered during such period, investigation might entail a considerable period of time before a determination is made that the property is owned or controlled by an enemy within the meaning of section 2 and therefore subject to seizure.

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[4] In declaring the end of World War II Congress provided that, notwithstanding this resolution . . . any property or interest which prior to January 1, 1947, was subject to vesting or seizure under the provisions of the Trading With the Enemy Act of October 6, 1917 . . . or which has heretofore been vested or seized under that Act . . . shall continue to be subject to the provisions of that Act . . . .

65 Stat. 451 (1951), 50 U.S.C. App. note preceding § 1 (1958).

Its usefulness to the enemy is not thereby obviated. Rather the contrary. Yet to immunize it because for some reason the vesting authority failed to reduce it to possession until hostilities have ceased, or the occupation ended, would leave untouched property which had been available to enemy control. Such immunization would also deprive the United States of valuable means of supporting its own war efforts. Those efforts, and the heavy responsibilities consequent upon a war, persist long after hostilities have ceased and occupied countries have been freed of the enemy.

For reasons thus suggested we think that in the absence of clearer language indicating the necessity for a different construction the enemy status appellant acquired during the occupation continued, insofar as section 9(a) is concerned, to the time of the vesting order; that is, we think that at that time the end of hostilities and of the occupation of the Netherlands had not removed appellant from the technical enemy status it had acquired during the occupation. *Orme* v. *Northern Trust Co.*, 410 Ill. 354, 102 N.E.2d 335 (1951); *cert. denied*, 343 U.S. 921. If this is so then appellant was an enemy within the meaning of section 9(a) when it filed the present suit.

Stated in a different manner, the definition of enemy in section 2 of the Act, as one who is "resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war" or "incorporated within such territory" is not to be construed as referring only to one who at the date of the vesting order is a resident of or chartered by a nation with which the United States "is [still] at war"; rather, it is to be construed as including a person who or corporation which, at the time of the vesting order, is one who has been a resident of an enemy occupied nation during its occupation or was then incorporated under the laws of an occupied territory and resident therein. "The word 'enemy' . . . of course refers to the person who or corporation which fulfilled the definition of an enemy during the

war." *Swiss Ins. Co.* v. *Miller*, 267 U.S. 42, 45. And lending some support to the position we take is *Hansen* v. *Brownell*, 98 U.S. App. D.C. 239, 234 F.2d 69. And see *Bank Voor Handel En Scheepvaart, N. V.* v. *Kennedy*, — U.S. App. D.C. —, 288 F.2d 375, *cert. denied*, 366 U.S. 962. Compare, however, *Willenbrock* v. *Rogers*, 255 F.2d 236, 238 (3d Cir. 1958).

It is suggested that the construction of "enemy" we adopt, and which has the result of enabling the United States to retain appellant's property without compensation, raises constitutional doubts under the Fifth Amendment. It is urged, therefore, that we should adopt a more limited construction which would preclude the confiscation of appellant's property. If, however, we are right in the reasons we have advanced in support of the construction we give the Act—that is, the efficacy of this construction in enabling the purposes of the Act to be fulfilled—then the same reasons remove the constitutional doubts. The constitutionality of confiscating enemy property in carrying out the war powers of course is not questioned.[5] A reasonable exercise of this aspect of the war powers permits the United States to reach property located within its borders which was available to or whose owner was under the control of the enemy while resident within occupied territory. To require as a constitutional matter that the property be actually vested during the occupation or before the end of hostilities would create a very substantial limitation upon the economies of warfare.

[5] Denying a person recovery of seized and vested property is not a deprivation of property without due process when the claimant is found to be an enemy. "There is no constitutional prohibition against confiscation of enemy properties." *United States* v. *Chemical Foundation, Inc.*, 272 U.S. 1, 11; *Stoehr* v. *Wallace*, 255 U.S. 239, 245; *Uebersee Finanz-Korporation* v. *Brownell*, 133 F. Supp. 615, 620 (D. D.C. 1955), *aff'd sub nom. Von Opel* v. *Brownell*, 100 U.S. App. D.C. 341, 244 F.2d 789, *cert. denied*, 355 U.S. 878. And see *Cummings* v. *Deutsche Bank*, 300 U.S. 115, 120-21.

We are cited to no precedent which holds with appellant's constitutional probings in the circumstances of the present case. The case of *Guessefeldt* v. *McGrath*, 342 U.S. 308, 318, turned on the construction to be given "resident within" Germany. While the Court points out that "friendly aliens are protected by the Fifth Amendment requirement of just compensation," citing *Russian Volunteer Fleet* v. *United States*, 282 U.S. 481, the Court found that the claimant never came within the definition of an enemy. It does not seem to us that this decision requires us to hold that one who concededly acquired, with respect to its property, enemy status during the enemy occupation of the Netherlands, under whose laws it was then incorporated, lost that status, with respect to its property, because the property was not vested while the occupation continued. This would be inconsistent with the purposes of the Act as gathered from its own text and with the congressional intention as expressed in the Joint Resolution of October 19, 1951.

The only reliance for consent of the United States to be sued in this case is section 9(a) of the Act. *Schilling* v. *Rogers*, 363 U.S. 666; *Bank Voor Handel En Scheepvaart, N. V.* v. *Kennedy*, *supra*; *Tiedemann* v. *Brownell*, 96 U.S. App. D.C. 9, 222 F.2d 802. Since that section does not cover the case, and this suit is in substance, though not in name, one against the United States to which it has not consented, the District Court properly awarded judgment for appellee. See *Bank Voor Handel En Scheepvaart, N. V.* v. *Kennedy*, *supra*. It goes without saying that this carries no possible implication of unfriendliness to the Netherlands. It rests solely on a technical enemy status acquired by appellant under the Trading with the Enemy Act by reason of the enemy occupation of the Netherlands and appellant's incorporation therein.

A further matter is noted. Before filing the instant suit in the District Court under section 9(a) appellant had applied to the Attorney General under the provisions of section 32(a)[6] of the Act for discretionary administrative

[6] 60 Stat. 50 (1946), as amended, 50 U.S.C. App. 32(a) (1958).

relief permitted by that section to technical enemies who could not qualify to sue under section 9(a). In response to the application appellee's predecessor advised appellant in writing as follows:

> Enclosed is the Order disallowing the above-numbered claim.
>
> For your information, it is the present practice of this Office, except in cases where a claim is clearly entitled to allowance, to permit the claimant whose right to sue is not barred by lapse of time to his remedy in court and thus avoid the possible delay and expense of a double set of hearings. Such procedure is authorized by an amendment to the Rules of Procedure for Claims of this Office, effective April 16, 1957....
>
> Under the provisions of Section 32 of the Trading with the Enemy Act, a timely suit may be instituted under Section 9(a) of the Act for recovery of the property claimed in the event you are dissatisfied with the administrative action taken on your claim, and the enclosed order of disallowance does not prejudice in any way your right to sue.

On the basis of the foregoing appellant contends that the Government may not in equity and good conscience claim that appellant is ineligible to sue under section 9(a) for any reason other than one which would render it ineligible as a claimant under section 32(a). But the question before the District Court was one of jurisdiction. Whatever relief, if any, appellant may seek on the basis of the previous disallowance of its application under section 32(a), the District Court was without jurisdiction of the complaint in the present case. In this situation we remand for dismissal of the complaint. *Schilling* v. *Rogers*, *supra*; *Tiedemann* v. *Brownell*, *supra*.

It is so ordered.

APPENDIX D

MARIE LOUISE WILLENBROCK

v.

WILLIAM P. ROGERS, Attorney General of the United States, as Successor to the Alien Property Custodian,

Appellant.

No. 12394.

United States Court of Appeals

Third Circuit.

Argued March 18, 1958.

Decided April 22, 1958.

Rehearing Denied May 27, 1958.

George B. Searls, Washington, D. C. (Dallas S. Townsend, Asst. Atty. Gen., Harold K. Wood, U. S. Atty., for the Eastern Dist. Pennsylvania, Philadelphia, Pa., Irwin A. Seibel, Marbeth A. Miller, Attys., Dept. of Justice, Washington, D. C., on the brief), for defendant-appellant.

T. Henry Walnut, Philadelphia, Pa., for appellee.

Before GOODRICH, STALEY and HASTIE, Circuit Judges.

GOODRICH, Circuit Judge.

This appeal concerns the application of words in the Trading with the Enemy Act, 50 U.S.C.A. Appendix, §§ 1-40. The plaintiff brought suit, under Section 9(a) of the Act, to recover certain property which had belonged to her and which was vested by orders of the Alien Property Custodian in 1947 and 1950. The district judge entered judgment in her favor. Willenbrock v. Brownell,

D.C.E.D.Pa. 1957, 152 F.Supp. 351, and the Attorney General Successor to the Alien Property Custodian,[1] appeals.

The significant facts are few. Miss Willenbrock was German born. She was naturalized in this country in 1928. In 1932, while in France, employed as a governess by an American employer, she went back to Germany to take care of her father and remained in Germany after his death in 1933. Except for eight months she was in Germany from 1932 to 1949. She inherited some property and lived off the income therefrom until the premises were destroyed by a bomb during the war. She lost her first naturalization for reasons not necessary to go into here, and was again naturalized in 1955. The plaintiff's state of mind is summed up by the trial judge in saying that "she never wanted to be considered a German citizen or resident, that she desired to be, at all times, an American citizen and to return to the United States to live when it appeared to her to be possible to do so without sacrificing her German property interests."

Section 9(a) permits suit in the district court by "any person not an enemy" as defined in Section 2(a) of the statute. The question to be decided, therefore, is the very narrow one whether the plaintiff is included within the statutory exclusion. It does not, however, turn upon finding that Miss Willenbrock was or was not an "enemy" of the United States in any literal sense. No one suggests that she was in any way disloyal to her adopted country. The problem is a technical one concerning the interpretation of the language in Section 2(a). There enemy is defined, inter alia, as "any individual * * * residing within the territory * * * of any nation with which the United States is at war."

---

[1] Pursuant to Exec. Order No. 9788, 3 C.F.R. 169 (1943-48 comp.), 50 U.S.C.A. Appendix, § 6 note.

During the war was the plaintiff "resident" in Germany? The words "resident" and "residence" have no precise legal meaning although they are favorite words of legislators. Sometimes they mean domicile plus physical presence; sometimes they mean domicile; sometimes they mean something less than domicile. All this is well established and the general statement would not be quarreled with.[2] We think the learned district judge in this case inclined to treat the term as though "residence" in the statute involved domicile. If the issue were domicile a good case could be made for finding that the plaintiff did not become domiciled in Germany because she always intended to return to the United States when she could do so without sacrificing her property interests. Cf. Dupuy v. Wurtz, 1873, 53 N.Y. 556.

We think, however, the authority which controls us here is Guessefeldt v. McGrath, 1951, 342 U.S. 308, 72 S.Ct. 338, 341, 96 L.Ed. 342. While the members of the Supreme Court differed as to one of the points in the case, they did not disagree with Mr. Justice Frankfurter's description of the content of "residence." Backed up by the legislative history the Court said, "'resident within' enemy territory implies something more than mere physical presence and something less than domicile."

If the term means something less than domicile we are quite clear that this plaintiff was resident in Germany. The length of time she was there is certainly indicative. One may, perhaps, stay in a place for seventeen years without becoming domiciled there; surely it is hard to think of a person staying that long without becoming a resident.

[2] See McGrath v. Kristensen, 1950, 340 U.S. 162, 71 S.Ct. 224, 95 L.Ed. 173; United States v. Stabler, 3 Cir., 1948, 169 F.2d 995; Goodrich, Conflict of Laws 50-51, 3d ed. 1949; Beale, Residence and Domicile, 4 Iowa Law Bull. 3, 7 (1918); Reese & Green, That Elusive Word, "Residence," 6 Vand. L.Rev. 561 (1953); Restatement, Conflict of Laws 2d, § 9, com. j (Tent. Draft No. 2, 1954).

Seventeen years is no temporary sojourn by any test. Furthermore, the plaintiff was not constrained to stay in Germany. See Guessefeldt v. McGrath, supra; United States v. Stabler, 3 Cir., 1948, 169 F.2d 995. The fact that one stays in a place by reason of economic desirability does not prevent the acquisition of a domicile there,[3] much less should it prevent one's being a resident.

Our conclusion that plaintiff was resident in Germany is supported by Brownell v. Oehmichen, 100 U.S. App. D.C. 214, 243 F. 2d 637, certiorari denied, 1957, 355 U.S. 842, 78 S.Ct. 49, 2 L.Ed. 2d 1. There is some trouble with Kaku Nagano v. McGrath, 7 Cir., 1951, 187 F. 2d 759, affirmed per curiam by an equally divided Court, 1952, 342 U.S. 916, 72 S.Ct. 363, 96 L.Ed. 685. Perhaps it can be explained, as the Government suggests, by the allegation of Mrs. Nagano that she was compelled to stay with her children in Japan.[4] Be that as it may, we think that the Guessefeldt case cited above gives us our mandate here.

There is a further element in this case, however, which was not brought to the notice of the court by counsel for either party. It was mentioned that there are two vesting orders. One was in 1947 (No. 9925; 12 Fed. Reg. 6797), and the other was in 1950 (No. 16340, 16 Fed. Reg. 107). The 1947 order had to do, according to an exhibit in the case, with the savings account which plaintiff had with the Girard Trust Company of Philadelphia. The vesting order does not say how much is involved but the judgment of the court indicates that it is $1,769.94. What has been said above with regard to "residence" applies to this order because plaintiff was a resident of Germany at the time.

---

[3] See 1 Beale, Conflict of Laws § 22.1 (1935); Goodrich, Conflict of Laws § 29 (3d ed. 1949).

[4] When the case came back after remand, the "law of the case" doctrine was heavily emphasized in the court's opinion. Kaku Nagano v. Brownell, 7 Cir., 1954, 212 F. 2d 262.

Now the second vesting order bears date 1950. It has to do with ten shares of Pennsylvania Railroad stock and two declarations of trust certificates issued by City Bank Farmers Trust Company of New York. The value of the property in this seizure according to the judgment in the court below is $6,500. The complaint in this case says that the plaintiff returned to the United States October 16, 1949 and took up her residence in the Eastern District of Pennsylvania. The answer is an enigmatic one because it denies the allegation of this particular paragraph to the effect the plaintiff was a nonenemy. There is no finding of fact on the subject.

Assuming that it can be shown that the plaintiff was a resident of Pennsylvania beginning October 16, 1949, the provision of the statute discussed above does not apply to her. The vesting order applies to the situation existing at its date. Swiss Nat. Ins. Co. v. Miller, 1925, 267 U.S. 42, 45 S.Ct. 213, 69 L.Ed. 504; Rudenberg v. Clark, D.C. D.Mass. 1947, 72 F. Supp. 381, 383.

One more point is to be noticed. Following the description of the property in the second paragraph of the vesting order there is a clause saying:

> " • • • hereby determined:
>
> "3. That to the extent that the person named in subparagraph 1 hereof is not within a designated enemy country, the national interest of the United States requires that such person be treated as a national of a designated enemy country (Germany)."

Then there is a line drawn to some fine print below which says:

> "all determinations and all action required by law, including appropriate consultation and certification, having been made and taken, and, it being deemed necessary in the national interest • • • ".

However, this portion of the order seems not to be relevant to our case. The language of the Executive Order 9193, July 6, 1942, 50 U.S.C.A. Appendix, § 6 note, excludes from the category of that which may be seized " • • • credit instruments • • • and securities" except to the extent that the Alien Property Custodian determines that the inclusion of these items is necessary. We have no record of any such determination by him.

It appears, therefore, that the judgment of the court below must be reversed as to the property included in the first seizure of 1947 but as to that which was taken under the 1950 vesting order, it would appear that the plaintiff is entitled to recover if in fact she no longer was a resident of Germany when the 1950 order became effective.

APPENDIX E

Fifth Amendment to the Constitution of the United States

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Trading With the Enemy Act, 40 Stat. 411, as amended, §§ 2(a), and 9(a), Tit. 50 App. U.S.C. §§ 2(a), and 9(a):

SEC. 2. The word "enemy," as used herein, shall be deemed to mean, for the purposes of such trading and of this Act—

(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory.

SEC. 9:

(a) Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property

Custodian or seized by him hereunder and held by him or by the Treasurer of the United States * * * may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided*, That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title * * * so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. * * *

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 165

SELINA ROMMEL, ET AL., *Petitioners*

v.

ROBERT F. KENNEDY, Attorney General, and as Successor to the Alien Property Custodian

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The findings of fact and conclusions of law of the district court (J.A. 55-64)[1] are unreported. The opinion of the United States Court of Appeals for the District of Columbia (Pet. App. A, pp. A1-A3) is reported at 301 F. 2d 544.

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[1] "J.A." refers to the Joint Appendix prepared for the court below and on file with this Court.

JURISDICTION

The judgment of the Court of Appeals was entered on March 15, 1962. The petition for a writ of certiorari was filed on June 8, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether German citizens who resided in Germany during the period from December 7, 1941 until February 1946, and admittedly were at that time enemies under Section 2(a) of the Trading With the Enemy Act, were precluded from maintaining an action under Section 9(a) of the Act for the return of property which the claimants owned while they resided in Germany and which was vested by the United States in 1947 and 1950, at which dates they were living in Switzerland.

STATUTE INVOLVED

The pertinent provisions of the Trading With the Enemy Act, 40 Stat. 411, as amended, 50 U.S.C. App. 1, *et seq.*, are as follows:

> *Section 2.* The word "enemy," as used herein, shall be deemed to mean, for the purposes of such trading and of this Act—
>
> (a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory.
>
> * * * * * *

Section 5(b)(1), During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest,

by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or persons as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may

perform any and all acts incident to the accomplishment or furtherance of these purposes * * *.

* * * * * *

Section 9(a). Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided*, That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the United States District Court for the District of Columbia or in the district court of the United

States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act [sections 1-6 and 7-39 of this Appendix], and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated.

* * * * *

STATEMENT

This is a consolidated action involving four suits brought under section 9(a) of the Trading With the Enemy Act by the petitioners, who sought to recover certain property (interests in testamentary and *inter vivos* trusts) vested by the United States under vesting orders issued in 1947 and 1950.

Petitioner de Courten was born in Germany in 1907 (J.A. 66), possessing German and Swiss citizenship

(J.A. 22). She resided in Germany from 1920 until late in January 1946 (J.A. 21, 67, 86). From 1941 until 1942 she was a civilian employee of the German Army in the office of the Mail Censor. In November 1948, she renounced her German citizenship (J.A. 22).

The three Rommels were born in Germany as German citizens. Their father was a captain in the German Army during the years 1940-1944 (J.A. 91). Their parents died in 1944, after which they lived with their aunt, petitioner de Courten. Two of the Rommels became Swiss citizens in 1956 and one in 1958 (J.A. 58).

In 1945, petitioner de Courten obtained permission to visit Switzerland. In January 1946, she took the three Rommels to Switzerland, where they were living at the time the vesting orders were issued.

The trial court ruled that the petitioners, by leaving Germany in 1946, had terminated their enemy status and that, since they were living in Switzerland at the time of the vesting orders, they were eligible under Section 9(a) to maintain a suit for the recovery of vested property.

The court of appeals reversed and remanded the case with directions to dismiss the complaint for lack of jurisdiction. It held that the enemy status of the claimants did not terminate when they left Germany for Switzerland but continued to the time of the vesting orders, thus precluding a suit under Section 9(a). The court relied on its previous ruling in the case of *N.V. Handelsbureau La Mola* v. *Kennedy*, 299 F. 2d 923, certiorari denied, June 25, 1962, holding that the enemy status acquired by a Netherlands corporation during the war as a result of German military occupation of Holland did not terminate when the German occupation ended.

ARGUMENT

The court below held that petitioners, persons admittedly resident in Germany throughout World War II, were "enemies" within the meaning of Section 2(a) of the Trading with the Enemy Act and thus precluded, under Section 9(a) of the Act, from maintaining a suit to recover vested property. The decision is clearly correct, and the question presented is of little current importance at this late stage in the administration of the alien property program.[2] There is less reason to consider this case than the *La Mola* case, in which the Court denied certiorari only last Term. October Term, 1961, No. 907.

1. Petitioners argue that it would require a strained interpretation of the Trading with the Enemy Act to hold that the Custodian may seize property of one who was formerly resident in an enemy country but is living outside of the enemy's territory as of the time that the seizure is effectuated. We disagree, believing that the statutory authority for the Custodian's vesting orders in this case is clear. Before turning to a consideration of the statute, however, we deem it important to point out that this case does not raise the kind of problem which might be presented if the Custodian had seized property which the claimants acquired or accumulated *after* their departure from Germany. The property interests here in question were owned by the claimants throughout the war years, when they resided in Germany. Indeed, during the years preceding the vesting, those property interests were "frozen" under the

[2] More than 19,000 claims were filed administratively for the return of vested property. As of April 30, 1962, only 621 were still pending before the successor to the Alien Property Custodian.

foreign funds control provisions which this government had adopted in 1940 and 1941. Thus, petitioners' grievance comes down to the fact that the Custodian's vesting orders in respect of their property were issued at a somewhat later date than such orders were issued in the case of some others similarly situated. Since the Custodian's vesting powers had not expired at the time he acted in this case, this difference is not material.

Section 5(b) of the Trading with the Enemy Act, as amended by the Joint Resolution of May 7, 1940, 54 Stat. 179, and the First War Powers Act, 1941, 55 Stat. 839, conferred upon the President plenary powers to control, during periods of national emergency or war, transactions involving property subject to the jurisdiction of the United States in which foreign nationals had any interest. See *supra*, p. 3. It was pursuant to this authority that the President promulgated the executive orders which established the so-called "freezing" controls. Executive Order 8389, April 10, 1940, 5 F.R. 1400, as amended by Executive Order 8785, June 14, 1941, 6 F.R. 2897 (applying those controls to nationals of Germany among others). "The freezing order of June 14, 1941," as this Court has stated (*Propper* v. *Clark*, 337 U.S. 472, 484), "immobilized the assets covered by its terms so that title to them might not shift from person to person, except by license, until the Government could determine whether those assets were needed for prosecution of the threatened war or to compensate our citizens or ourselves for the damages done by the governments of the nationals affected." As of June 14, 1941, on which date petitioners were admittedly residents of Germany and hence nationals of a designated enemy country, the

property involved in this litigation was immobilized for possible future vesting.

Section 5(b) authorized not only the "freezing" of property in which designated nationals had an interest but the vesting of such property "when, as, and upon the terms, directed by the President." By Executive Order 8785, the President authorized the Custodian to vest any property in which a German national had an interest on or after June 14, 1941.

The President's vesting powers under Section 5(b) did not abate upon the termination of the "shooting war", as petitioners expressly concede (Pet. 13). Indeed, as the court below noted, the Joint Resolution of Peace between the United States and Germany, 65 Stat. 451, adopted on October 19, 1951, provided that:

> *any property* or interest which prior to January 1, 1947, *was subject to vesting or seizure* under the provisions of the Trading With the Enemy Act of October 6, 1917, as amended, *or which has heretofore been vested or seized* under that Act * * * *shall continue to be subject to the provisions of that Act* in the same manner and to the same extent as if this resolution had not been adopted * * *. [Emphasis added.]

Since the property was lawfully seized, there remains only the question whether petitioners have a right to its return under Section 9(a)—a right available only to one who is not an "enemy, or ally of enemy." "Enemy" is defined in Section 2 of the Act to include specifically any "resident" of enemy territory. As this Court has stated, "The word 'enemy' * * * of course refers to the person who or corporation which fulfilled the definition of an enemy during the war," *Swiss Insurance Co.* v. *Miller*, 267 U.S. 42, 45; cf.

Bank Voor Handel En Scheepvaart, N.V. v. *Kennedy*, 288 F. 2d 375 (C.A. D.C.), certiorari denied, 366 U.S. 962.

In *Brownell* v. *Ochmichen*, 243 F. 2d 637 (C.A. D.C.), the court below, rejecting a claim under Section 9(a), upheld the Custodian's seizure of property effectuated after the claimant had left Germany and come to the United States.[3] This Court denied certiorari. 355 U.S. 842. More recently, the Court of Appeals upheld the seizure of property of a Netherlands corporation, effectuated after the termination of the German occupation of Holland, and held that a remedy under Section 9(a) was barred because the plaintiff corporation, during the war, had its situs in enemy-occupied territory. *N.V. Handelsbureau La Mola* v. *Kennedy*, 299 F. 2d 923.[4] This Court again denied review. October Term, 1961, No. 907, June 25, 1962. Mr. Justice Black noted his dissent from the denial of certiorari in *La Mola*, but on the specific ground that the Netherlands was a friendly country which had been overrun by enemy forces. In the instant case, as emphasized above, the claimants were residents of Germany throughout the period of active hostilities, and the property in question was owned by them during that same period.[5]

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[3] See also *Hansen* v. *Brownell*, 234 F. 2d 60 (C.A. D.C.).

[4] As the Court of Appeals there noted, investigation of the status of property to determine the extent, if any, of the foreign interest is often a time-consuming process.

[5] The Court of Appeals did not find it necessary to reach the question whether petitioner de Courten was also an enemy because of her employment by the German Army. We reserve the right to urge this alternative ground of affirmance in the event that certiorari should be granted.

2. Petitioners assert conflict with *Willenbrock* v. *Rogers*, 255 F. 2d 236 (C.A. 3). The contest there was over the "residence" of an American citizen who went to Germany for a temporary stay, lived there from 1932 to 1949 (first to care for an elderly parent and then to preserve her inheritance) and thereafter, believing her American citizenship had been lost, entered the United States as a quota immigrant seeking to regain her American citizenship. After ruling in favor of the government on the issue of residence, the court adverted to the fact that the vesting orders involved were issued in 1947 and 1950. Although the point had not been briefed or argued, the Third Circuit ruled that, as to the 1950 vesting order, the case should be remanded to the trial court for a determination as to whether or not plaintiff had changed her residence before the 1950 vesting order. The case was subsequently settled out of court. To the extent that this somewhat interlocutory ruling supports the proposition that enemy status under the Act may be shed by removal of residence, it is inconsistent with the *Ochmichen* and *La Mola* cases, *supra*, where the claimants were denied recovery of property which had been vested after they had left enemy territory and while they were residing in neutral or allied countries. The same arguments presented on behalf of the present petitioners were advanced in the unsuccessful petitions filed in *Ochmichen* and *La Mola*. The question has become less important with the passage of time and there appear to be no new or intervening circumstances which would warrant grant of the writ in the instant case.

3. Petitioners suggest that a constitutional question is raised by holding that property may be taken from an owner who "formerly resided in enemy territory"

(Pet. 23). But certainly Congress may treat as an enemy one who was a citizen and resident of a foreign country during the period when that country was at war with the United States. Indeed, petitioners themselves do not dispute that the very property here in issue could have been taken, without any possibility of objection on constitutional or statutory grounds, between 1941 and 1946. It is frivolous to suggest that if that were sufficient enemy connection to justify seizure of the property, the United States could not constitutionally take the same property, thereafter. Petitioners argue that when an enemy leaves enemy territory he may no longer be subject to effective enemy control and that this obviates the need to take his property in the interest of avoiding its possible utilization by the enemy country. The short answer is that the war power has a broader reach and fully sustains the taking of enemy or enemy-tainted property for purposes of this country's affirmative use, including reparations. See *Clark* v. *Uebersee Finanz-Korp.*, 332 U.S. 480; *Propper* v. *Clark*, 337 U.S. 472. If there were a constitutional question, moreover, it would not follow that Section 9(a) might be rewritten to afford a remedy to persons in terms barred by the Act. It would seem, rather, that a remedy would lie in the Court of Claims by way of a suit for just compensation under the Fifth Amendment. See *Cities Service Co.* v. *McGrath*, 342 U.S. 330, 335; *Silesian-American Corp.* v. *Clark*, 332 U.S. 469, 479-480; *Russian Volunteer Fleet* v. *United States*, 282 U.S. 481. See also the government's brief in opposition filed in *Bank Voor Handel En Scheep-*

vaart, N.V., et al. v. Kennedy, et al., October Term, 1960, No. 958. Petitioners have not filed such a suit.[6]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY 1962.

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[6] Petitioners may now be barred from proceeding in the Court of Claims by the statute of limitations. See *Soriano v. United States*, 352 U.S. 270. But the failure to pursue this avenue is one with which petitioners are chargeable, especially since it has long been settled that Section 9(a) is unavailable to one who falls within the Section 2 definition of "enemy".

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 165

SELINA ROMMEL, ET AL., *Petitioners*

v.

ROBERT F. KENNEDY, Attorney General of the United States, as Successor to the Alien Property Custodian, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONERS' BRIEF IN REPLY TO RESPONDENT'S OPPOSITION

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POINT I

If this Court does not grant *certiorari* in the cases at bar, a conflict of decisions will remain between the Court of Appeals for the Third Circuit, *Willenbrock* v. *Rogers*, 255 F. 2d 236 (3 Cir. 1958), and the Court of Appeals for the District of Columbia Circuit, *Kennedy* v. *Rommel*, 301 F. 2d 544 (1962).

In commenting on the *Willenbrock* case Respondent observes, "The case was subsequently settled out of court." (p. 11). This was done only after denial of rehearing. The fact of settlement is not significant except as it indicates the Government accepted the decision without further action. Petitioners submit

that this decision is not correctly characterized as a "somewhat interlocutory ruling" (p. 11). It is a decision of the Third Circuit Court of Appeals which is dispositive of the issue in the case, and unlike the decision in the case at bar, is without what amounts to a dissent.

POINT II

The constitutional argument made in Point III of the Petition (pp. 23-26), is not "frivolous", as characterized by Respondent (p. 12). The argument is based on decisions of this Court. What Petitioners contend is that the constitutional protection against the seizure of property without the payment of just compensation cannot be avoided by merely characterizing the owner of the seized property as enemy when he was not one at common law and when it cannot be shown that Congress intended to change the common law rule.

POINT III

Respondent asserts that "the question presented is of little current importance at this late stage in the administration of the alien property program," and states that as of April 1962 only 621 claims were still pending (p. 7). Petitioners urge that the confiscation of their property is a matter of sufficient seriousness to warrant the consideration and decision of this Court, and the relief from confiscation which they seek. They also urge that the *Trading With the Enemy Act*, permanent legislation, and the limitations on the War Power in the area of confiscation are not matters of mere historical interest, but have a continuing importance.

POINT IV

Respondent refers to the denial of *certiorari* in *N. V. Handelsbureau La Mola* v. *Kennedy*, Mr. Justice Black

dissenting, 82 S. Ct. 1582 (1962). In that case a Petition for Rehearing has been filed and is now pending. It may well be that on reconsideration the petition will be granted. Whether or not the petition in that case is granted, the petition in the cases at bar should be granted, for the reasons set out in the petition.

POINT V

In a footnote (p. 10) Respondent suggests an alternative ground of affirmance, that the Petitioner de Courten was an enemy agent. The Trial Court below found that the Petitioner de Courten was not an enemy agent, and furthermore she is only one of the four petitioners (J.A. 55, 61). Accordingly, the suggested alternative ground does not exist.

POINT VI

Respondent suggests on the constitutional issue that if there is a remedy Petitioners should be relegated to the Court of Claims and not permitted to maintain their actions under Section 9(a) of the Act. This argument is directly contrary to *Guessefeldt* v. *McGrath*, 342 U.S. 308 (1952) and *Clark* v. *Uebersee Finanz Korp.*, 332 U.S. 480 (1947). In both cases the constitutional issue was given weight in construing the Act to give a remedy. The *Guessefeldt* decision, on which Petitioners expressly rely, the Respondent chooses to ignore, from which course of action Petitioners are obliged to conclude that Respondent finds the decision unanswerable.

CONCLUSION

This Court should review the decision of the Court below, which permits the confiscation of the property of Petitioners. It is the constitutional rule that property of non-enemies may not be taken for public use without

compensation, even though the public use is in the exercise of the War Power. It is well established under the common law rule, which the Act did not change, that Petitioners were friendly aliens, and by this Court that such persons are entitled to the protection of the Fifth Amendment to the Constitution.

This Court should resolve the conflict between *Willenbrock* and the cases at bar by adopting the rule of the *Willenbrock* case that prior residence in enemy territory does not serve to make an enemy, for the purposes of Section 9(a) of the Act, of a person with respect to his property seized after his residence in enemy territory has ceased. That rule accords with the common law and is supported by the legislative history of the Act. The cases at bar should be reversed because their holding is contrary to the common law and the Congressional intent.

Respectfully submitted,

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